

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

South Carolina Electric & Gas Company

Project No. 516-390

ORDER DENYING REHEARING

(Issued December 22, 2004)

1. On January 29, 2004, the Commission approved several applications filed by South Carolina Electric & Gas Company (SCE&G) to sell 14 separate parcels of project land adjacent to the reservoir of the Saluda Project No. 516.<sup>1</sup> SCE&G, South Carolina Department of Natural Resources (SC Natural Resources), U.S. Department of the Interior (Interior), and Lake Murray Association, jointly with others, (Murray Association)<sup>2</sup> filed timely requests for rehearing generally arguing that the Commission erred by approving the land sales. As discussed below, we find that approval of the land sales was appropriate and that it is in the public interest to reaffirm our finding that the land sales could be approved without compromising the ongoing process to update the project's shoreline management plan to protect shoreline resources.

---

<sup>1</sup> *South Carolina Electric & Gas Co.*, 106 FERC ¶ 61,086 (2004)(SCE&G).

<sup>2</sup> Murray Association's rehearing request is filed jointly with Lake Watch on Lake Murray, South Carolina Coastal Conservation League, American Rivers, Hawleek Creek Homeowners Association, League of Women Voters Columbia Area, and South Carolina Wildlife Federation.

## **Background**

2. The Lake Murray shoreline plan for Lake Murray is required to be updated every five years.<sup>3</sup> The stated purpose of the plan is to: (1) provide lake management policies to maintain and conserve the area's natural and man-made resources; (2) comply with the terms of the Saluda Project license and the Commission's regulations and orders; and (3) provide a balance between recreation, environmental protections, and development.<sup>4</sup>

3. During its review of the 1991 update, the Commission conducted an environmental analysis of SCE&G's shoreline plan and approved the plan subject to SCE&G conducting, among other things, an inventory of the Lake Murray shoreline.<sup>5</sup> SCE&G was scheduled to file another update to the shoreline plan in 1994. In 1994, SCE&G filed the results of the 1991 inventory, which was approved by the Commission in 1997.<sup>6</sup> While SCE&G was required to file its update to the shoreline plan in September 1999, it requested and the Commission granted an extension to file the updated plan on February 1, 2000.

4. After filing the updated shoreline plan, SCE&G made multiple filings, between March 2000 and August 2001, regarding the sale of the 14 parcels of land at issue in this proceeding.<sup>7</sup> The Commission issued public notice of the filings in May 2000, December 2000, and September 2001. In response to issues raised by commenters, and because the

---

<sup>3</sup> In 1979, the Commission ordered SCE&G to prepare a shoreline management plan. *See South Carolina Electric & Gas Co.*, 7 FERC ¶ 61,180, at n. 43 (1979).

<sup>4</sup> *See South Carolina Electric & Gas Co.*, 107 FERC ¶ 62,273 at P 2-8 (2004), for an extensive history of SCE&G's shoreline plan.

<sup>5</sup> *South Carolina Electric & Gas Co.*, 56 FERC ¶ 62,194 (1991).

<sup>6</sup> *See* September 22, 1997 letter order issued in Project No. 516-201.

<sup>7</sup> The applications to sell the indicated parcels were filed on the following dates and in the subdockets indicated in parentheses. March 20, 2000: Bass Harbor (Project No. 516-319) and James Byrum (-321). June 26, 2000: Whitesides/Sexton (-326). November 27, 2000: Hamm Estate (-329), Michel Hawkins (-330), Kenneth Chapman (-331), Nick Leventis (-332), and Brent Richardson (-333). August 22, 2001: Phil Hamby (-354), Sam Wessinger (-355), Kirk Rumph (-356), Randy and Myra Moore (-357), Scott Lominick (-358), and Cheryse Tapp (-359).

Commission had not addressed the environmental consequences of the shoreline plan since 1991, Commission staff prepared an environmental assessment (EA) of the proposed sales, issued on October 20, 2003.

5. On January 29, 2004, the Commission issued an order approving the land sales. The Commission concluded that the sale of the 14 parcels, affecting, in total, a little over 52 acres -- all of which are designated for private development in the then-effective and the updated shoreline plan -- could be approved without compromising the ongoing process to update the project's shoreline plan.

6. Concurrent with its review of the proposed land sales, on October 31, 2003, Commission staff issued a final EA on the 1999 updated shoreline plan, and subsequently approved and modified the updated plan in an order issued on June 23, 2004.<sup>8</sup> Among other things, the order required that SCE&G: (1) update its list of environmentally sensitive areas; (2) create a 50-foot buffer adjacent to these areas; and (3) establish a 25-foot natural zone inland from the 360-foot high water contour to protect project shoreline resources in non-environmentally sensitive areas adjacent to future development areas. The additional buffer zones would serve to protect shoreline resources such as aesthetics, as well as facilitate public access for fishing and hiking adjacent to land that may be developed.<sup>9</sup> Clearing is restricted in the 25 and 50-foot buffer zones, which only allow paths to boat docks and a path along the shoreline for public access.

## **Discussion**

### **A. Regulatory/Environmental Review**

7. SCE&G contends that the Commission erred by subjecting the proposed land transfers to duplicative regulatory review. SCE&G argues that the shoreline plan approved in 1991 established a formal, collaborative process through which affected resource agencies and other interested parties were afforded an opportunity to comment on proposed revisions to the shoreline plan and to provide input to the shoreline plan. Therefore, SCE&G concludes that when it proposes to transfer property under that plan,

---

<sup>8</sup> *South Carolina Electric & Gas Co.*, 107 FERC ¶ 62,273 (2004), *order clarifying and modifying order and denying reh'g*, 109 FERC ¶ 61,083 (2004).

<sup>9</sup> *Id.* at P 32. The Commission imposed the same buffer zone requirement with respect to the proposed land sales. *See SCG&E*, 106 FERC at P 36.

any potential environmental concerns related to the proposed sale already had been addressed through the collaborative process that went into developing the currently effective shoreline plan and in the Commission's review and approval. Further, SCE&G states that the purpose of updating the shoreline plan every five years is to keep the plan current with changing circumstances. It asserts that by ignoring the shoreline plan, the Commission has defeated the purpose of the plan and the update process.

8. We disagree. At the time SCE&G made the filings for the sale of the 14 parcels, the shoreline plan had not been subject to Commission review for over nine years. Additionally, at the same time the land sale applications were filed, the Commission's analysis of 1999 shoreline plan update was already delayed because of inadequacies in the 2000 filing.<sup>10</sup> Therefore, because of the limited scope of the sales, and the fact that the land in question was already slated for future development, Commission staff reasonably determined that it would be most efficient to review the sales separately from review of the shoreline plan.

9. Additionally, SCE&G argues that the Commission's treatment of the proposed land sales is contrary to the National Environmental Policy Act (NEPA).<sup>11</sup> SCE&G claims that where an overall plan describes future development activities in specific locations, an EA or other environmental study document is subject to judicial review at the time the overall plan is approved.<sup>12</sup> It contends that agency actions subsequently

---

<sup>10</sup> Because the filing was deficient, the Commission issued an additional information request on September 13, 2000 giving SCE&G a year to conduct meetings with resource agencies and compile the necessary additional information. Two days before the information was due, SCE&G requested an additional six-month extension. *See* SCE&G letter filed on September 28, 2001 in Project No. 516-362. In response, Commission staff issued a letter stating that it was troubled by SCE&G's lack of diligence in complying with the request, and noting that while SCE&G stated that its personnel were busy with other activities and were unable to collect the necessary information, SCE&G had been able to file 34 filings requesting approval to sell numerous parcels at the lake during the same time period. *See* Commission staff letter issued on October 19, 2001 (Project No. 516-318).

<sup>11</sup> 42 U.S.C. §§ 4321-4347 (2004).

<sup>12</sup> *Citing Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

taken under such a comprehensive plan are not subject to future analysis.<sup>13</sup> Additionally, SCE&G contends that the Commission erred in consolidating the 14 separate proposed land sales for one single environmental review.

10. In fact, the decision whether an environmental analysis is required is at the discretion of the agency.<sup>14</sup> Here, the Commission determined that since the last environmental review in 1991, there had been significant new circumstances and information relevant to environmental concerns that would have bearing on the proposed action. Therefore, the Commission determined it was necessary to prepare an EA for the contested land sales.<sup>15</sup> And while SCE&G argues that the Commission erred in consolidating the land sales into one proceeding, it was an appropriate exercise of administrative discretion to review all the applications in one proceeding where, as here, there was substantial overlap of the issues. In addition, while the Commission will routinely approve uncontested, unproblematic land sales,<sup>16</sup> it is within our discretion to scrutinize particular sales in greater detail. Indeed, standard Article 30 of the Saluda Project license establishes a process allowing for detailed Commission review of conveyances.<sup>17</sup>

---

<sup>13</sup> *Citing Sierra Club v. Penfold*, 857 F.2d 1307, 1313-14 (9th Cir. 1988)(finding that mining operation annually disturbing less than five a acres each are not subject to environmental review beyond that provided in the initial regulatory process); *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1382 (10th Cir. 1980)(holding that impacts considered in earlier environmental study are not subject to further review at the time “detailed development plans” are received).

<sup>14</sup> *See Wisconsin v. Weinberger*, 745 F.2d 412, at 417 (1984).

<sup>15</sup> *See* 40 CFR 1502.9(c)(1)(ii)(2004), adopted in § 380.1 of the Commission’s regulations.

<sup>16</sup> *See, e.g.* Commission staff letter issued on August 22, 2001, in Project Nos. 516-338, *et al.*

<sup>17</sup> Specifically, Article 30 states:

At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the

(continued)

**B. Project Boundary**

11. SCE&G seeks clarification regarding the Commission's statement that lands have been removed from the project boundary. It states that it has not proposed to remove any of the 14 parcels from the project boundary and that it has never removed any of the land that has been sold from the project boundary. SCE&G contends that by leaving the land within the project boundary it is in a better position to enforce license conditions that may affect the permissible uses of the land.

12. In the rehearing order on SCE&G's updated shoreline plan, the Commission pointed out that it generally requires that land used for private residential development not be included in the project boundary, and that it appears that there are permanent and non-permanent structures within the current Saluda Project boundary.<sup>18</sup> As a result, the Commission required that SCE&G inventory all developed land within the project boundary and determine if the property still is needed for project purpose. Issues concerning SCE&G's project boundary will be resolved during its upcoming relicensing proceeding.

**C. Buffer Zones**

13. SCE&G objects to an imposition of an additional 25-foot buffer zone within the existing 75-foot buffer zone. It argues that such a condition is inconsistent with and undermines the effectiveness of the shoreline plan, and would only serve to make enforcement of the condition more difficult and time-consuming. Further, SCE&G asserts that there is no record evidence to support this new requirement.<sup>19</sup>

---

proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

<sup>18</sup> *South Carolina Electric & Gas Co.*, 109 FERC ¶ 61,083 at P 10 (2004).

<sup>19</sup> We note that when SCE&G filed its request for rehearing on the land sales, the Commission had not issued its order approving its updated shoreline plan. The updated shoreline plan imposed this condition on all shoreline classified for future development. Therefore, SCE&G's objection is moot. *South Carolina Electric & Gas Co.*, 107 FERC ¶ 62,273, at P 31-34.

14. In addition, SCE&G asks that, if the Commission continues to require the buffer zones, it clarify several aspects of this requirement. First, SCG&E requests that the Commission clarify that the requirement applies only to the 14 parcels and not to all project land sold by SCE&G. It argues that any requirement that establishes buffer zones around land that is not adjacent to the land proposed to be sold would exceed the scope of this proceeding and would be improper. Further, SCE&G states that the Commission did not specify what land use restrictions should be put in place in the buffer zones, and requests that the Commission clarify whether SCE&G is permitted to construct boat docks, walking paths and other, similar recreational conveniences in these areas, or whether these areas are to be left entirely undisturbed.

15. SCE&G also requests that the Commission clarify how it measures the buffer zones. Specifically, it states that the 75-foot buffer zones are measured by a line 75 feet inland from the 360-foot contour mark. Therefore, SCE&G measures the 25-foot buffer zone from the 360-foot shoreline and 50 feet from the property line. It requests clarification of the measurement of the 50-foot buffer zone adjacent to the environmentally sensitive areas, which it interprets the measurement to extend 50 feet from the edge of any environmentally sensitive area and from the 360-foot contour line to the project boundary line. Finally, it requests clarification that the 50-foot buffer zone applies to areas around the environmentally sensitive areas identified in the diagrams and maps submitted with the various applications involving the transfer of the subject properties.

16. The Commission implemented the additional buffer zone requirements for all areas adjacent to future development areas as part of SCE&G's updated shoreline plan approved in an order issued in June 2004 after the land sale order was issued.<sup>20</sup> The buffer zones are measured horizontally from the 360-foot high water contour,<sup>21</sup> with the 25 and 50-foot buffer zones incorporated inside the 75-foot buffer. The 50-foot buffer zone applies to the shoreline adjacent to areas designated as environmentally sensitive in SCE&G's recently approved updated plan. The 25-foot buffer zone applies to all other shoreline adjacent to the 360-foot high water contour. The purpose of the buffer zones is to create a vegetative, aesthetically appealing buffer between property development and the Lake Murray shoreline, and to serve as public access for fishing and hiking adjacent to the developed shoreline. While no clearing is allowed in the 25 and 50-foot natural vegetative buffer zones, paths to boat docks and for public access are allowed. Limited clearing is allowed in the remaining property (25 or 50 feet) in the 75-foot buffer zone.

---

<sup>20</sup> *South Carolina Electric & Gas Co.*, 107 FERC ¶ 62,273 (2004).

<sup>21</sup> *See* Land Sale EA at n. 4.

**D. Environmentally Sensitive Areas/Conservation Areas**

17. The EA for the land sales recommended that the list of environmentally sensitive areas adjacent to the parcels designated for sale be updated, in consultation with FWS and SC Natural Resources, prior to the properties being sold. On rehearing, Interior contends that SCE&G has failed to meaningfully consult with FWS about updating the environmentally sensitive areas. It argues that the consultation recommended in the EA was a condition precedent to the Commission's conclusion that the land sales will not significantly impact the quality of the human environment. It asserts that the Commission cannot approve the proposed land sales until SCE&G complies with all the staff recommendations in the EA and updates the environmentally sensitive areas in consultation with the FWS. Murray Association makes similar arguments.

18. Murray Association also contends that while SCE&G is required to establish a 50-foot natural buffer zone around each identified environmentally sensitive area, parcels that include small stream confluences that are designated as conservation areas are not designated environmentally sensitive areas. Therefore, it argues that the conservation areas are not adequate to protect water quality.

19. While the EA recommended that the list of environmentally sensitive areas be updated prior to the parcels being sold, the January 29 Order did not adopt that recommendation. Thus, it was not a condition precedent to the sales. In the updated shoreline plan orders, the Commission required that SCE&G, in consultation with FWS and SC Natural Resources, update the list of environmentally sensitive areas along the project shoreline and file the results of that inventory by June 23, 2005. As we noted in the January 29, 2004 Order, the lands in question were designated for private development; that remains the case under the updated plan. Moreover, we required SCE&G to establish protective buffer zones around environmentally sensitive areas at or adjacent to the lands.<sup>22</sup>

20. By definition, the environmentally sensitive areas are located below the 360-foot high water contour line. Because SCE&G retains ownership to the 75-foot buffer zone adjacent to the 360-foot high water contour line, and thus retains ownership over all potentially environmentally sensitive areas, there was no reason to delay the sales of these properties. Any further adjustments to the environmentally sensitive areas along this shoreline that are a result of the updates list will apply to the 14 parcels.

21. Under the recently approved shoreline plan, SCG&E proposed and the

---

<sup>22</sup> 106 FERC ¶ 61,086 at P 34-36.

Commission approved stream buffer zones on proposed land sale parcels containing a perennial or intermittent stream.<sup>23</sup> SCE&G will classify these areas as a conservation easement that would be kept within the project boundary. No land-disturbing activity would take place within the identified stream buffers. SCE&G designated more than 20 acres of conservation areas in the backs of 17 coves on eight of the parcels. As designated conservation areas, under the updated shoreline plan, no clearing is allowed in these areas. Thus, wildlife habitat and shoreline resources are protected in these areas as they are in environmentally sensitive areas.

#### **E. Rebalancing**

22. SC Natural Resources contends that the Commission should not approve the land sales until the review of the shoreline plan is complete and the Commission resolves issues regarding the rebalancing of shoreline classifications. Further, it argues that the land sales are not in keeping with section 2.7 of the Commission's regulations, which states that the licensee must "include within the project boundary enough land to ensure the optimum development of recreational resources afforded by the project."<sup>24</sup>

23. Interior agrees. Noting that the updated shoreline plan EA states that it is difficult for the Commission to determine if the areas currently set aside by SCE&G for recreation are adequate and that SCE&G has not provided any information regarding the location or description of these areas, Interior argues that project land with recreation potential should not be sold until the Commission makes such a finding.

24. Murray Association raises similar arguments and contends that it is concerned about the potential loss of outdoor recreational opportunities including, bank fishing, camping, picnicking, hiking, scenic values, and boating. It also claims that the Commission failed to address the loss of waterfowl hunting opportunities that will result from the sale of these lands.

25. The record does not support the assertion that the sale of the 14 parcels will significantly impact recreation. No party has shown that there are not sufficient public recreation opportunities at the project. Indeed, all areas below the 360-foot high water contour as well as the 75-foot buffer zones adjacent to the contour remain available for public access that includes, among other things, bank-fishing, hiking, and boating. Further, as stated in the shoreline plan rehearing order, approximately 24 percent of

---

<sup>23</sup> *South Carolina Electric & Gas Co.*, 107 FERC at P 30.

<sup>24</sup> *See* 18 C.F.R. § 2.7 (2004).

project land is designated for forest and game management. We have found that this provides adequate access for outdoor recreation, including hunting.

26. Moreover, the Commission addressed rebalancing in the rehearing order for the updated shoreline plan.<sup>25</sup> Currently, approximately 60 percent of the shoreline of Lake Murray is developed, with another 16 percent classified for future development. While the Commission agrees that more refinement of the land classification should be explored, given the complex nature of the issues involved in the Saluda Project's shoreline plan, it is more appropriate to address further issues concerning rebalancing in the context of the comprehensive framework of the relicensing process.<sup>26</sup>

#### **F. Cumulative Impacts**

27. Interior contends that the land sales will result in an irreversible and irretrievable commitment of important resources, which is not discussed in the EA. In fact, the EA addressed the cumulative effects of the proposed sales on water quality, fish and wildlife resources, and aesthetic resources.<sup>27</sup> Generally, the EA determined that any cumulative adverse impacts would be mitigated by the imposition of the buffer zones adjacent to the 360-foot-high contour shoreline. The January 29 Order requires SCE&G to establish a 50-foot natural buffer around each of the identified environmentally sensitive areas and a 25-foot natural buffer along the water's edge in all other shoreline areas not protected by the 50-foot buffers, in addition to the 75-foot setback buffer, which has restrictions on cutting and clearing. No clearing is allowed in the 25 and 50-foot buffer zones and the conservation areas. These measures will adequately reduce the potential for significant cumulative impacts of the sales.

28. Further, we note that the parcels proposed for sale are located along approximately five and three-quarter miles of shoreline, or less than one percent of the total Lake Murray shoreline. SCE&G has designated more than 20 acres of conservation areas in the back of 17 coves at eight of the parcels, thus protecting habitat and shoreline resources. Moreover, approximately one-third of the shoreline at these parcels has been designated as sensitive habitat or conservation areas. In addition, in the updated shoreline plan, the Commission required that SCE&G conduct studies and develop

---

<sup>25</sup> *South Carolina Electric & Gas Co.*, 109 FERC at P 37.

<sup>26</sup> *South Carolina Electric & Gas Co.*, 109 FERC at P 49.

<sup>27</sup> See EA at 22, 24, and 34, respectively.

programs aimed at further protecting the Lake Murray shoreline from development pressures.<sup>28</sup>

### **G. Shoreline Plan**

29. Interior and Murray Association contend that the Commission ignored the facts that the shoreline plan had not yet been revised since 1994, that the proposed shoreline plan had not been approved when the land also were authorized, and that the land sale order was issued before the Commission extended the current license term by three years. Interior expresses concern that the license extension will further delay implementation of a revised shoreline plan and allow land sales and development to continue under the existing shoreline plan for an additional three years.

30. Murray Association requests that the Commission stop all land sales until the next shoreline plan is updated or until relicensing, where the findings leading to the land classification in the 1980 shoreline plan can be revisited. It contends that the Commission should not approve any land sales until it revisits its decision not to include re-evaluation of land use classification in the 2000 shoreline plan update in light of the license extension.

31. Since the Commission issued the land sale order, it has approved SCE&G's updated shoreline plan.<sup>29</sup> As discussed above, because the shoreline plan in effect when the land sale applications were filed was out-of-date, the Commission conducted a separate assessment of the proposed sales. We find that the land sale order is consistent with the Commission's action in the updated shoreline plan orders.<sup>30</sup> Moreover, the

---

<sup>28</sup> In addition to the additional environmentally sensitive area inventory, the Commission required SCE&G: (1) develop a shoreline inventory and stabilization plan, (2) identify perennial and intermittent stream that should be protected; (3) develop a woody debris and stump management program: and (4) develop a buffer zone restoration plan.

<sup>29</sup> *See supra* n. 8.

<sup>30</sup> In addition to the additional environmentally sensitive area inventory, the Commission required SCE&G: (1) develop a shoreline inventory and stabilization plan, (2) identify perennial and intermittent stream that should be protected; (3) develop a woody debris and stump management program: and (4) develop a buffer zone restoration plan.

updated shoreline plan is now in effect, and its provisions, including the environmental protection measures it requires, will apply to any future activities on the lands at issue here, unless and until they are removed from the project boundary.

32. We note further that although the SCE&G's license has been extended, that does not affect implementation of the updated shoreline plan, nor does it affect the Commission's environmental analysis of the land sales. The updated shoreline plan requires various studies to be filed on June 23, 2005. The Commission will then review them, require any necessary changes, and determine implementation schedules.<sup>31</sup>

#### **H. Monitoring**

33. Murray Association states that to justify the sales the Commission relies on SCE&G's statement that property owners will not be allowed to privatize the buffer zone by extending yards or encroachments within the buffer zones. However, it contends that SCE&G has not adopted practices necessary to prevent privatization, and that its monitoring plan is inadequate. Therefore, the Association concludes that the Commission's reliance on SCE&G's assurances is unreasonable and that the Commission should not allow the land sales until it resolves compliance, monitoring, and enforcement issues in the shoreline plan update. Murray Association also contends that the unresolved monitoring and enforcement issues will adversely affect water quality.

34. The updated shoreline plan requires that SCE&G prepare a buffer zone restoration plan for areas that have been improperly cleared by landowners and an implementation schedule which will be filed with the Commission on June 23, 2005.<sup>32</sup> Any issues concerning compliance, monitoring, and enforcement of the buffer zones can be addressed in that proceeding.

---

<sup>31</sup> *South Carolina Electric & Gas Co.*, 109 FERC at P 51

<sup>32</sup> *South Carolina Electric & Gas Co.*, 107 FERC at P 44-48, *South Carolina Electric & Gas Co.*, 109 FERC P 38-40.

The Commission orders:

The requests for rehearing filed by South Carolina Electric & Gas Company, South Carolina Department of Natural Resources, U.S. Department of the Interior, and Lake Murray Association on March 1, 2004, are denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.